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NTSB Order No. EA-4171

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of May, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. IRA DONALD FARRINGTON, Respondent.	Docket SE-12224

OPINION AND ORDER

The Administrator has appealed from the order of Administrative Law Judge Jimmy N. Coffman, rendered at the conclusion of the Administrator's case-in-chief on June 10, 1992,[1] dismissing the Administrator's complaint as stale under Rule 33 of the Board's Rules of Practice and Procedure, 49 C.F.R.

[1]Attached is an excerpt from the hearing transcript containing the law judge's comments and order granting respondent's motion to dismiss the complaint.

section 821.33.[2] The Administrator's order, which served as the complaint, sought to revoke respondent's mechanic certificate with inspection authorization as well as his Airline Transport Pilot (ATP) certificate for violations of sections 43.12(a)(1) and 91.173(c) of the Federal Aviation Regulations ("FAR," 14

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[2]49 C.F.R. § 821.33 provides, in pertinent part, as follows:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

* * *

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

C.F.R. Part 91).[3] For the reasons cited below, we will uphold the dismissal, albeit on other grounds.[4]

The Order of Revocation, dated March 10, 1991, alleges, in pertinent part, as follows:

> 1. At all times material herein you were and are the holder of Mechanic Certificate Number 405367026 with inspection authorization, and Airline Transport Pilot Certificate Number 658422.
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> 2. At all times you, as owner of Farrington Corporation[,] were the owner/operator of civil aircraft N6155S, an Air & Space 18A, and civil aircraft N6154S, an Air & Space 18A.
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> 3. On or about July 26, 1989, inspectors from the Louisville, Kentucky Flight Standards District Office conducted an inspection of N6155S, for the purpose of the issuance of an Export Certificate of Airworthiness.
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> 4. At the time of the above inspection the aircraft records for N6155S indicated that a tow hitch had been installed on May 5, 1981. However, no FAA Form 337 could be located.
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> 5. You were advised that the above FAA Form 337 would be necessary prior to the issuance of the Export Certificate of Airworthiness.
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> 6. On or about August 29, 1989, Mr. Thomas J. Davey, the General Manager for Farrington Corporation, submitted to the inspectors what purported to be the FAA Form 337 for N6155S.

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[3]Sections 43.12(a)(1) reads, in pertinent part:

> § 43.12 **Maintenance records: Falsification, reproduction, or alteration.**
> (a) No person may make or cause to be made:
> (1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part.

Section 91.173 (now 91.417(c)), provides that an owner or operator must make all maintenance records required to be kept available for inspection by the Administrator.

[4]The Administrator filed a brief on appeal and respondent filed a reply.

> 7. Review of the referenced form revealed that the aircraft serial number and registration number had been altered from N6154S to N6155S and the information provided therein was false.
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> 8. On September 9, 1989, and October 27, 1989, you attested to the authenticity of the subject FAA Form 337.
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> 9. On or about October 17, 1989, you were requested by the inspectors in the Louisville, Kentucky Flight Standards District Office to make the maintenance records for N6155S available for inspection.
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> 10. As of this date, you have failed to present the maintenance records for inspection.
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> 11. By reason of the foregoing, you have demonstrated that you lack the qualifications to be the holder of a mechanic certificate with inspection authorization.
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> 12. By reason of the foregoing, you have demonstrated that you lack the good moral character required to be the holder of ATP privileges pursuant to Section 61.151 of the Federal Aviation Regulations.

Upon request of respondent's counsel, the law judge agreed to entertain all of respondent's motions after the Administrator concluded his case-in-chief.[5] At that time, respondent moved for dismissal, citing the Board's stale complaint rule and the failure of the Administrator to establish a prima facie case. The law judge dismissed the complaint as stale but did not rule on the other motion, viewing it as moot under the circumstances.

On appeal, the Administrator contends that the law judge erroneously applied the stale complaint rule, as the

[5]We are puzzled as to why the law judge allowed respondent's counsel to argue the motion to dismiss stale complaint after the Administrator put on all his evidence. Since a stale complaint motion relates to the allegations set forth in the complaint, the proper time to decide the matter is before the hearing has begun. If the complaint is stale, there is no need to proceed further.

Administrator's revocation order/complaint alleges intentional falsification and a lack of qualifications. While we must agree with the Administrator on this issue, after consideration of the briefs of the parties and the record, we nevertheless will uphold the dismissal of the case, as discussed infra.

Board precedent does not support the dismissal of a complaint as stale under the circumstances of the instant case. The six-month time restriction in which the Administrator must advise a respondent of the reasons for a proposed certificate action is not applicable to complaints embodying charges that, if proven, would evidence a certificate holder's lack of qualifications.[6] We have explained that "the stale complaint rule does not apply `where an issue of lack of qualification would be presented if the allegations are assumed to be true.'" Administrator v. Mitchem, 4 NTSB 707, 708 (1983), quoting Administrator v. Air East, Inc., 2 NTSB 870, 872 (1974), affirmed, 512 F.2d 1227 (3d cir. 1975).

In the instant case, the complaint charged that respondent intentionally falsified a document required to be made, kept, or used to show compliance with the FARs, and specifically stated that, as a result, respondent lacked the qualifications of a mechanic certificate holder with inspection authorization. Aside

[6]In order to accomplish this evaluation, it must be determined whether, if any or all of the allegations taken as a whole were true, the facts as alleged would present an issue of lack of qualification. See Administrator v. Wisler, NTSB Order No. EA-3591 at 4 (1992); Administrator v. Konski, 4 NTSB 1845, 1847 (1984).

from the clear wording of this complaint, intentional falsification charges inherently present an issue of lack of qualification.[7] The usual sanction imposed in intentional falsification cases is certificate revocation. See Mitchem at 708 and n. 6. Where revocation is the appropriate sanction for the violations alleged, a lack of care, judgment, and responsibility is, of necessity, indicated. Id. at 708. Given the established precedent, we conclude that the law judge's dismissal of the complaint as stale was error.

Ordinarily at this point, we would remand the case for further hearing on the merits. In this case, however, we do not believe that a remand is warranted. Although the law judge granted respondent's motion to dismiss the complaint, he did not decide whether the Administrator had established a prima facie case, despite respondent having argued the motion. After reviewing the record in its entirety, we are constrained to conclude that the Administrator did not make a prima facie showing in support of the charges and, as a consequence, the case must be dismissed. See Administrator v. Kiscaden, NTSB Order No. EA-3618 at 3, n. 4 (1992).

The charge of intentional falsification requires the

[7] See Administrator v. Potanko, NTSB Order No. EA-3937 (1993). See also Administrator v. Altman, 3 NTSB 3311, 3314 (1981) ("the pattern of falsifying records demonstrates that the person involved lacks the care, judgment, and responsibility required of the holder of an airman certificate"). Cf. Administrator v. Walters, NTSB Order No. EA-3835 at 5, n. 6 (1993) (issues of qualification arise from intentionally false statements made on medical certificate applications).

Administrator to present evidence of 1) a false representation by respondent; 2) in reference to a material fact; that was 3) made with knowledge of its falsity. See Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976). If circumstantial evidence is used to prove actual knowledge, the "circumstantial evidence must be so compelling that no other determination is reasonably possible." Administrator v. Wilson, NTSB Order No. EA-4013 at 4 (1993), citing Administrator v. Hart, 3 NTSB 24, 26 (1977). An intent to falsify is also necessary to sustain the charge. Administrator v. Blanton, NTSB Order No. EA-3840 at 6 (1993). A summary of the evidence adduced at trial will reveal why we do not believe that the Administrator set forth enough evidence to survive the motion to dismiss.

The Administrator's case rests primarily on the testimony of Philip Messina, an inspector from the FAA's Louisville, Kentucky Flight Standards District Office (FSDO). He testified as follows: In July 1989 respondent, as president of Farrington Aircraft Corporation, sought an Export Airworthiness Certificate for N6155S, an Air and Space Model 18A gyroplane. On July 26, 1989, Mr. Messina and another inspector, while conducting the requisite inspection of the aircraft and examination of the log books, noticed a log book entry dated May 5, 1981, for the installation of a tow hitch. The entry was signed by Mr. Don Farrington, but the Form 337 for major repair and alteration could not be located. Mr. Messina told Thomas Davey, the General Manager of Farrington Aircraft Corporation, that the 337 was

missing and a duplicate could be obtained from the aircraft registry in Oklahoma City. (Transcript (Tr.) at 19, 28.) Mr. Messina thereafter contacted the aircraft registry himself on July 27 and learned that there was no 337 on file for N6155S for the installation of a tow hitch. (Tr. at 34.) Mr. Messina did not so advise Mr. Davey or respondent.

On August 29, 1989, Mr. Davey sent a letter to the FSDO enclosing what he stated was the missing Form 337, which he indicated had been found in Mr. Farrington's office.[8] (Exhibit (Ex.) A-5.) After noticing that the aircraft serial and registration numbers on the 337 had been obviously altered,[9] and that it appeared that the number N6154S had been changed to N6155S, Mr. Messina again contacted the FAA aircraft registry on September 7, 1989. He then learned that N6154S, also an Air and Space Model 18A gyroplane, had a Form 337 on file for a tow hitch installed on May 5, 1981. (Tr. at 47.) The next day, Mr. Messina called respondent and, without telling him what he had discovered, asked him to fax a signed statement attesting to the authenticity of the Form 337 submitted by Mr. Davey.[10]

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[8]The form approved the aircraft for service, was signed by Ira D. Farrington on 5/12/81, and included Mr. Farrington's inspection authorization number. Also on the form was the signature of the A & P mechanic, a John Hughett, dated 5/5/81, and the signature of the FAA inspector, an E. R. Kidder, dated 5/12/81, signifying that he approved the alteration as being in compliance with applicable airworthiness requirements.

[9]It appears that correction fluid was used to cover one digit on the aircraft serial and registration numbers and a different digit was typed over the correction. (Ex. A-6.)

[10]There are two conflicting versions of this telephone

Respondent complied, stating that the form "is the original for N6155S." (Ex. A-11.) Based on the aforementioned information, Mr. Messina took steps to initiate this enforcement action.

During cross examination, it became apparent that the log book entry regarding the tow hitch installation had been mistakenly entered into the book for aircraft N6155S instead of N6154S.[11] Mr. Messina testified that he never looked at the log books for N6154S to see if the entry for the tow hitch was recorded there. (Tr. at 93-94.) He also testified that 1) N6155S did not have a tow hitch on it when he performed his inspection and it did not appear that a tow hitch had ever been installed on the aircraft (Tr. at 151, 168); 2) respondent wrote

(..continued)
conversation in evidence. Both are handwritten accounts dated 9/8/89 and signed by Mr. Messina; however, the Administrator's exhibit referred to "what appeared to be strikeovers, or errors as they pertain to the aircraft registration and serial numbers," while the other copy, admitted into evidence by respondent, referred to "typographical errors." (Exs. A-10 and R-1). The Administrator's exhibit also stated that the inspector had "informed Mr. Farrington that I questioned the authenticity of this FAA form 337." No such statement was included on respondent's exhibit. During cross examination, Mr. Messina admitted that he wrote both versions. He stated that R-1 contained the notes he took during his conversation with respondent and that it was likely that he never questioned the form's authenticity in his conversation with respondent. (Tr. at 112-14.)

[11]Farrington Aircraft Corporation purchased N6155S in January 1982. (Ex. A-4.) Farrington Aircraft was the owner of N6154S in May 1981, as evidenced by the application for a restricted airworthiness certificate to conduct aerial advertising, signed by respondent on May 11, 1981, and by FAA Inspector E. R. Kidder on 5/12/81. (Ex. A-15.) At the time it sought to obtain an export certificate of airworthiness for N6155S, Farrington Aircraft no longer owned N6154S, which, apparently, was in England. Respondent proffered logbook evidence indicating that a tow hitch had been removed from N6154S in August 1981. (Ex. R-10.)

him a letter stating that he made an unintentional error and entered the reference to the tow hitch installation into the wrong log book (Tr. at 142-43); 3) that if a tow hitch was, in fact, never installed on N6155S, then the 337 was not needed to obtain the export certificate;[12] and 4) the May 5, 1981, entry in the log book for N6155S may have been a mistake.[13]

In light of the inspector's testimony, it is evident that the Administrator did not establish a prima facie case that the Form 337 was intentionally falsified. There is no direct evidence of any intent to falsify the form, and the only reasonable and logical inference created by the circumstantial evidence suggests that whoever made the changes to the numbers on the form most likely did so in the mistaken belief that he was correcting an erroneous reference to N6154S. The form that was found, after all, in other relevant respects, mirrored the information pertaining to the tow hitch installation contained in the log book for 55S. In these circumstances, we do not think

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[12]Respondent subsequently received an export certificate of airworthiness in February 1992.

[13]During cross examination, Mr. Messina was asked,

> "[a]nd now you know that there is some indication, according to the letters you've read, that it was an improper entry. Improper meaning a mistaken entry in 55 Sierra when it should have been in 54 Sierra. You know that by now."

To which he responded,

> "I know that by now, yes."

(Tr. at 279.)

that the obviously changed numbers on the form, or any other evidence advanced by the Administrator, can rationally be viewed to create an inference that the respondent knew that the form applied to 54S but wanted to dupe the inspector, or anyone else for that matter, into believing that it applied to 55S.

As to the allegation of failure to make aircraft maintenance records available for inspection, the only evidence introduced was Mr. Messina's October 17, 1989, letter to respondent requesting that the maintenance log books for N6155S be mailed to him and Mr. Messina's testimony that respondent never made his records available. Section 91.173(c) does not require that original log books be mailed to an individual inspector. It simply states that maintenance records must be made "available for inspection" by the Administrator. No evidence was introduced to indicate that respondent actually refused to make the records available for inspection or in any way barred the inspector from looking at them, only that the log books had never been mailed to the inspector. We are not persuaded that this showing was sufficient to establish a prima facie case on this allegation.[14]

[14]Arguably, since the 91.173 charge does not itself present an issue of lack of qualification, it could have been dismissed as stale. However, since the Administrator has already presented his evidence on the charge and we have decided that a prima facie case was not established, the issue is moot.

ACCORDINGLY, IT IS ORDERED THAT:

1. The law judge's order granting respondent's motion to dismiss the complaint as stale is reversed; however,

2. The matter is dismissed for failure to establish a prima facie case.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.